

**A Ritz Garden Hotel Sdn Bhd v Industrial Court,
 Malaysia & Anor**

HIGH COURT (KUALA LUMPUR) — ORIGINATING MOTION NO R1-25-
47 OF 2000

B ABDUL AZIZ J
28 MAY 2002

Civil Procedure — Stay of proceedings — Stay, when granted — Delay, how considered — Whether there was delay in applying for stay of proceedings — Whether there was failure to state the provision under which the application for stay of proceedings was made — Rules of the High Court 1980 O 53 r 3

C Labor Law — Employment — Termination of employment — Wrongful dismissal — Application for stay of proceedings to prevent proceedings towards enforcement of award pending judicial review of award — Nexus between two companies joined in proceedings by percentage of shares held — Whether a company having shares in another company be made liable to pay an employee of the other company for wrongful dismissal

D On an application made ex parte, the applicant company, on 11 December 2000, obtained leave under O 53 r 3(1) of the Rules of the High Court 1980 ('the RHC') to apply for judicial review of Industrial Court Award No 159 of 2000, by which three companies, including the applicant company, were ordered to pay backwages totaling RM168,000 to the second respondent, the general manager of Shencourt Ritz, in consequence of his dismissal by Shencourt Ritz, his employer, without just cause and excuse. The applicant company's application for leave, however, did not include a prayer for a stay of proceedings to prevent proceedings from being taken in the Industrial Court towards the enforcement of the award pending judicial review of the award. Ten days after leave was granted, the applicant company filed its application for a stay of proceedings. The main question that arose in this application was whether a company (the applicant company) was liable to pay an employee of another company (Shencourt Ritz) for the wrongful dismissal of the employee by the other company, simply because the former company had a share in the other company. There were also subsidiary matters submitted, inter alia: (i) that there was delay in applying for the stay of proceedings; (ii) failure of the application for stay to state the provision under which it was made; and (iii) that the applicant's averment in its affidavit in support of its application was not supported by evidence.

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Held, allowing the application:

I (1) Since stay depended on leave — because a stay would be out of the question if leave was not granted — the delay should be considered from the time when leave was granted, in which case the delay was only ten days, which ought not to matter. In any case, no time limit had been fixed by the rules for applying for a

stay of proceedings and no reason had been suggested to the court why delay in applying should prevent the granting of a stay (see pp 357H–358A).

- (2) It was true that the application did not state O 53 r 3(5) of the RHC, but the heading of the notice of motion for a stay, following the heading of the earlier ex parte notice of motion for leave, did cite O 53(1) of the RHC, and although it was an error, a perusal of O 53 of the RHC would leave no doubt that what was intended was O 53 r 3(1) of the RHC, which was the provision for leave, and that the application for stay must be under O 53 r 3(5) of the RHC. The failure to specifically mention O 53 r 3(5) of the RHC could not have prejudiced, misled or embarrassed the second respondent in any way to warrant a dismissal of the application (see p 358B–C); *Jong Chuk v Chong Tung Sang & Ors* [1999] 6 MLJ 160 distinguished.

- (3) If the amount of RM168,000 was paid to the second respondent, there was no certainty that the applicant would succeed in getting back the whole amount or any part of it in the event that it succeeded in having the award quashed. That was a valid fear that required no evidence beyond the known circumstances (see p 358F–G).

- (4) From the award, the only consideration on which the applicant company was joined in the proceedings was the fact that it held 14.23% of the shares in Shencourt Ritz, which was considered as creating a nexus between the two companies to justify the joinder of the applicant company. If such a fact justified the joinder of a company, there was a danger that every company that had a share in another company would be made liable for the wrongful dismissal of the employees of the other company. To justify the joinder of a company to make it liable, the facts must be such as to justify a finding in reality that the company was the employer of the person dismissed by the other company. Such facts did not exist in this case and to say that the applicant company's claim of merits was doomed to failure was being far too bold (see p 360B–D); *Harris Solid State (M) Sdn Bhd v Bruno Gentil slo Pereira* [1996] 3 MLJ 489 and *Hotel Jaya Puri Bhd v National Union of Hotel, Bar & Restaurant Workers & Anor* [1980] 1 MLJ 109 distinguished.

[Bahasa Malaysia summary]

Atas satu permohonan yang dibuat secara ex parte, syarikat pemohon, pada 11 Disember 2000, memperolehi kebenaran di bawah A 53 k 3(1) Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT tersebut') untuk memohon kajian semula kehakiman Award No 159 Mahkamah Perusahaan tahun 2000, yang mana tiga buah syarikat, termasuk syarikat pemohon, diperintah membayar gaji tunggakan berjumlah

- A** RM168,000 kepada penentang kedua, pengurus umum Shencourt Ritz, akibat pemecatannya oleh Shencourt Ritz, yang merupakan majikannya, tanpa alasan dan sebab munasabah. Namun demikian, permohonan syarikat pemohon untuk kebenaran tidak termasuk rayuan penggantungan prosiding untuk menahan tindakan yang diambil dalam Mahkamah Perusahaan terhadap penguatkuasaan
- B** award tersebut sementara menunggu kajian semula kehakiman award tersebut. Sepuluh hari selepas kebenaran diberikan, syarikat pemohon memfailkan permohonan mereka untuk penggantungan prosiding. Soalan utama yang berbangkit dalam permohonan ini adalah sama ada sesebuah syarikat (syarikat pemohon di sini) bertanggungjawab
- C** membayar seorang pekerja syarikat yang lain (Shencourt Ritz di sini) untuk pemecatan salah oleh syarikat yang satu lagi, semata-mata kerana syarikat pertama memiliki saham dalam syarikat yang satu lagi. Perkara-perkara subsidiari diujahkan, antara lain: (i) bahawa adanya kelewatan dalam memohon penggantungan prosiding; (ii) kegagalan dalam permohonan untuk penggantungan untuk menyatakan peruntukan di bawah mana ia dibuat; dan (iii) bahawa penegasan pemohon-pemohon dalam affidavit mereka yang menyokong permohonan tidak disokong oleh keterangan.
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Diputuskan, membenarkan permohonan tersebut:

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- (1) Oleh kerana penggantungan bergantung pada kebenaran — kerana penggantungan sudah tentu mustahil sekiranya kebenaran tidak diberikan — kelewatan haruslah diambil kira dari masa kebenaran diberikan, yang mana kelewatan hanyalah sepuluh
- F** hari, yang seharusnya tidak penting. Walau bagaimanapun, tiada had masa telah ditetapkan oleh kaedah-kaedah untuk memohon penggantungan prosiding dan tiada alasan telah dikemukakan kepada mahkamah mengenai mengapa kelewatan dalam permohonan akan menahan kelulusan penggantungan (lihat ms 357H–358A).
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- (2) Adalah benar bahawa permohonan tersebut tidak menyatakan A 53 k 3(5) KMT tersebut, tetapi tajuk notis usul untuk penggantungan, berikutan tajuk notis usul ex parte untuk kebenaran, memang menyebut A 53(1) KMT tersebut, dan meskipun ia merupakan satu kesilapan, satu bacaan A 53 KMT tersebut tidak akan meninggalkan keraguan bahawa apa yang dimaksudkan adalah A 53 k 3(1) KMT tersebut, yang merupakan peruntukan untuk kebenaran, dan bahawa permohonan untuk penggantungan mestilah di bawah A 53 k 3(5) KMT tersebut. Kegagalan untuk menyebut A 53 k 3(5) KMT tersebut secara khusus tidak mungkin telah menjejaskan, memperdaya atau meresahkan penentang kedua dalam apa-apa cara untuk mewajarkan penolakan permohonan (lihat ms 358B–C); *Jong Chuk v Chong Tung Sang & Ors* [1999] 6 MLJ 160 dibeza.
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- (3) Sekiranya amaun sebanyak RM168,000 dibayar kepada penentang kedua, tiada kepastian bahawa pemohon-pemohon akan berjaya dalam mendapat balik keseluruhan amaun atau mana-mana bahagian daripadanya andainya mereka berjaya membatalkan award tersebut. Ini merupakan kekhuatiran yang sah yang tidak memerlukan apa-apa keterangan melampaui keadaan yang sudah menjadi umum (lihat ms 358F–G).
- (4) Daripada award tersebut, satu-satunya pertimbangan pada mana syarikat pemohon dicantumkan dalam prosiding adalah hakikat bahawa ia memegang 14.23% saham dalam Shencourt Ritz, yang dianggap sebagai mewujudkan satu kaitan di antara dua syarikat tersebut bagi menjustifikasikan cantuman pemohon syarikat pemohon. Andainya hakikat sedemikian menjustifikasikan cantuman sebuah syarikat, terdapat satu risiko bahawa setiap syarikat yang mempunyai saham dalam sebuah syarikat yang lain akan dijadikan bertanggungjawab berdasarkan undang-undang ke atas pemecatan salah para pekerja syarikat yang satu lagi. Untuk menjustifikasikan cantuman sesebuah syarikat supaya ianya bertanggungjawab berdasarkan undang-undang, fakta-fakta mesti menunjukkan adalah justifikasi untuk memutuskan syarikat itu merupakan majikan pekerja yang dipecat oleh syarikat yang satu lagi. Fakta-fakta demikian tidak wujud dalam kes ini dan untuk mengatakan bahawa tuntutan berdasarkan merit oleh syarikat pemohon memang ditakdirkan gagal adalah melampau (lihat ms 360B–D); *Harris Solid State (M) Sdn Bhd v Bruno Gentil s/o Pereira* [1996] 3 MLJ 489 dan *Hotel Jaya Puri Bhd v National Union of Hotel, Bar & Restaurant Workers & Anor* [1980] 1 MLJ 109 dibeza.]

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Notes

For cases on granting of stay of proceedings, see 2 *Mallal's Digest* (4th Digest, 2001 Reissue) paras 5599–5600.

For cases on termination of employment, see 8 *Mallal's Digest* (4th Digest, 2001 Reissue) paras 1015–1081.

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Cases referred to

Che Wan Development Sdn Bhd v Co-operative Central Bank Bhd [1989] 3 MLJ 40 (refd)

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Harris Solid State (M) Sdn Bhd v Bruno Gentil s/o Pereira [1996] 3 MLJ 489 (distsd)

Hotel Jaya Puri Bhd v National Union of Hotel, Bar & Restaurant Workers & Anor [1980] 1 MLJ 109 (distsd)

Jong Chuk v Chong Tung Sang & Ors [1999] 6 MLJ 160 (distsd)

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See Teow Guan & Ors v Kian Joo Holdings Sdn Bhd & Ors [1995] 3 MLJ 598 (refd)

A Legislation referred to

Industrial Relations Act 1967 s 29(a)

Rules of the High Court 1980 O 53 r 3(1), (5)

Shamini A Mahalingam (Shamini M & Partners) for the applicants.

B *Ramdhari @ Jai Ram (Lobo & Assoc)* for the respondents.

Abdul Aziz J: On an application made ex parte and filed on 8 May 2000, the applicant company, on 11 December 2000, obtained leave under O 53 r 3(1) of the Rules of the High Court 1980 ('the RHC') from KC Vohrah J (as he then was) to apply for judicial review of Industrial Court Award No 159 of 2000 given on 27 March 2000, by which the Industrial Court ordered three companies, namely Shencourt Ritz (Kuala Lumpur) Sdn Bhd ('Shencourt Ritz'), the applicant company and Deluxe Focus Sdn Bhd ('Deluxe') to pay backwages totalling RM168,000 to the second respondent, the general manager of Shencourt Ritz, in consequence of his dismissal by Shencourt Ritz, his employer, without just cause and excuse.

D Order 53 r 3(5) of the RHC provides as follows:

The grant of leave under this rule shall not, unless the judge so directs, operate as a stay of the proceedings in question.

E It is usual practice, where the applicant is an employer who has been ordered to pay his former employee, for a prayer for stay of proceedings to be included in an ex parte application for leave, and stay will usually be ordered. The purpose of the stay is to prevent the proceedings from being taken in the Industrial Court towards enforcement of the award pending judicial review of the award.

F The applicant company's application for leave, however, did not include a prayer for stay of proceedings, and although there was a general prayer for consequential orders, no attempt was made by the applicant company's counsel on 11 December 2000 to move for a stay on that prayer. I believe that the need for a stay was overlooked.

G So, on 21 December 2000, ten days after leave was granted, the applicant company filed their application for stay of proceedings. This judgment concerns that application.

Before dealing with the main question that arises on this application, I shall dispose of several subsidiary matters raised by the second respondent's counsel in opposing the application.

H The first is the question of delay. The second respondent's counsel said that the applicant company delayed for seven months in applying for a stay. I take it that he reckoned the time from the date of the award, 27 March 2000, until the date of filing of the stay application, 21 December 2000. Since stay depends on leave — because a stay would be out of the question if leave is not granted — and since stay is usually given at the same time as leave, I think delay should be considered from the time when leave was granted, in which case the delay was only ten days, which ought not to

matter. In any case, no time limit has been fixed by the rules for applying for stay of proceedings and no reason has been suggested to me why delay in applying should prevent the granting of a stay.

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The second subsidiary matter is the failure of the application for stay to state the provision under which it was made. Citing *Jong Chuk v Chong Tung Sang & Ors* [1999] 6 MLJ 160, learned counsel for the second respondent submitted that for that reason the application should, instead of being considered or allowed, be struck out. It is true that the application does not state O 53 r 3(5) of the RHC, but the heading of the notice of motion for a stay, following the heading of the earlier ex parte notice of motion for leave, does cite O 53(1), and although it is an error, a perusal of O 53 of the RHC would leave no doubt that what was intended was O 53 r 3(1) of the RHC, which is the provision for leave, and that the application for stay must be under O 53 r 3(5) of the RHC. I do not see why, in those circumstances, the failure to specifically mention O 53 r 3(5) of the RHC should warrant a dismissal of the application. It could not have prejudiced, misled or embarrassed the second respondent in any way.

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The third subsidiary matter relates to the applicant's averment in para 14(c) of its affidavit in support of its application that if the award is not stayed, the second respondent would enforce the award and, in that event, the applicants' application for judicial review would be rendered nugatory. Citing *Che Wan Development Sdn Bhd v Co-operative Central Bank Bhd* [1989] 3 MLJ 40, learned counsel for the second respondent submitted that the applicant's averment was not supported by evidence.

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I think what the applicant has failed to do is not so much to support its averment by evidence as to express in what way they conceived that if stay was not granted, their application for judicial review would be rendered nugatory. But what they have failed to express is, in the circumstances of the case, so obvious as not to require expression. The second respondent is an individual, a dismissed employee, not an organization or a company that carries on a business. If the amount of RM168,000 was paid to the second respondent, there is no certainty that the applicant would succeed in getting back the whole amount or any part of it in the event that it succeeded in having the award quashed. That, I think, is a valid fear that requires no evidence beyond the known circumstances that I have mentioned to support it. That fear can only be dispelled by the second respondent setting out circumstances concerning himself to assure the court that he would be able to refund the money if the award were quashed, but he has not filed any affidavit.

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I come now to the main question that arises on this application.

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As I said at the outset, it was Shencourt Ritz who was the employer of the second respondent and who dismissed him. In the Industrial Court, the claim was originally by the second respondent against Shencourt Ritz. Later, on the application of the second respondent, the applicant company and Deluxe were joined to Shencourt Ritz as parties by virtue of s 29(a) of the Industrial Relations Act 1967 for the reason that the applicant company and Deluxe were respectively the second and third largest shareholders of

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- A** Shencourt Ritz, the applicant company holding 14.23% and Deluxe holding 11.64%, the largest shareholder being Shencourt Resorts Sdn Bhd (60.52%). The applicant company and Deluxe subsequently applied for disjoinder but the Industrial Court made no order on the application. The upshot was that the award of backwages was made against the three companies, the Chairman of the Industrial Court holding that the joinder of the applicant company and Deluxe was justified.

We have here, therefore, a situation where a company (the applicant) is made liable to pay an employee of another company (Shencourt Ritz) for the wrongful dismissal of the employee by the other company, simply because the former company has a share in the other company.

- C** In para 7 of their affidavit in support of their application for stay, the applicant maintains that it has a 'pembelaan yang baik' because although being a 14.23% shareholder in Shencourt Ritz, it was not the employer of the second respondent and there was no privity of contract between it and him. The applicant is in effect claiming that there was no legal basis for joining it and making it liable for the dismissal of the second respondent by
- D** Shencourt Ritz.

- In submission on the question of the need for the applicants to show special circumstances justifying the grant of a stay, the second respondent's counsel submitted, relying on *See Teow Guan & Ors v Kian Joo Holdings Sdn Bhd & Ors* [1995] 3 MLJ 598 at p 611, that the applicant's claim of merits for judicial review was doomed to failure and therefore, irrespective of the question of special circumstances, a stay ought not to be granted. To my understanding, what the second respondent's counsel meant was that in law, it was conclusive that the applicant was liable for the wrongful dismissal of the second respondent because in law it was conclusive that the applicant was the employer of the second respondent. I form that understanding because in so submitting, the second respondent's counsel relied on the Court of Appeal decision in *Harris Solid State (M) Sdn Bhd v Bruno Gentil s/o Pereira* [1996] 3 MLJ 489, which in turn (p 510) relied on the Federal Court decision of *Hotel Jaya Puri Bhd v National Union of Hotel, Bar & Restaurant Workers & Anor* [1980] 1 MLJ 109. In those cases, companies
- E** who were not the apparent employers were joined on the employer's side in proceedings in the Industrial Court and were made liable for wrongful dismissal as employers of the dismissed employees.
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It must be appreciated, however, that in those cases, there were reasons to justify a finding that the added companies were in reality the employers of the dismissed workmen.

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- In *Harris Solid State*, to mention some of the features of the case, the company that was the apparent employer and the two companies that were joined were subsidiaries of a common holding company (p 501) and 'the facts and circumstances of the case called for, if not demanded, that the corporate veil that masked the three [companies] be lifted' (p 510). It was found that 'there was, on the admitted and proved facts, functional unity or integration among the three [companies]' (p 511). Further, they contrived between themselves by a 'charade' to put an end to the union to
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which the employees belonged and to punish them for their union activities (p 515) .

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In *Hotel Jaya Puri* it was found, after considering the whole of the oral and documentary evidence, that the added company was the real employer of the dismissed workmen (p 111), the company which was the apparent employer and the added company being in reality one enterprise, and the employees being employees working in one group enterprise (p 112).

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In this case, it is apparent from the award of the Chairman of the Industrial Court that the only consideration on which the applicant company was joined in the proceedings was the fact that it held 14.23% of the shares in Shencourt Ritz, which the chairman considered as creating a nexus between the two companies to justify the joinder of the applicant company. I am afraid that if such a fact justifies the joinder of a company, there is a danger that every company that has a share in another company will be made liable for the wrongful dismissal of the employees of the other company. To justify the joinder of a company to make it liable, the facts must be such as to justify a finding that in reality, the company was the employer of the person dismissed by the other company. Such facts do not exist in this case and to say that the applicants' claim of merits is doomed to failure is being far too bold.

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I allow the stay application and make orders in terms of prayers (a) and (c) thereof.

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Application allowed.

Reported by Zahid Taib

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